Supreme Court, U.S.
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In The

Supreme Court of the United States

STATE OF TENNESSEE,

Petitioner,

v.

GEORGE LANE, BEVERLY JONES, and UNITED STATES OF AMERICA,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12131-12165 (2002), exceeds Congress's authority under section 5 of the Fourteenth Amendment, thereby failing validly to abrogate the states' Eleventh Amendment immunity from private damage claims.

2. Whether the abrogation analysis under Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12131-12165 (2002), differs when an individual Title II claim is purportedly tied to due process concerns rather than equal protection concerns.

LIST OF PARTIES

The Plaintiffs in this action are George Lane and Beverly Jones. In addition to the State of Tennessee, twenty-five Tennessee counties – Bledsoe, Cannon, Chester, Claiborne, Clay, Cocke, Decatur, Fayette, Grainger, Hancock, Hawkins, Hickman, Houston, Jackson, Jefferson, Johnson, Lake, Lewis, Meigs, Moore, Perry, Pickett, Polk, Trousdale, and Van Buren – were also named as defendants in the district court. The United States intervened as a party pursuant to 28 U.S.C. § 2403 in the Sixth Circuit. Only the parties named in the caption were parties on appeal to the Sixth Circuit.

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PETITION FOR A WRIT OF CERTIORARI

The Attorney General and Reporter of Tennessee, on behalf of the State of Tennessee, respectfully petitions this Court for a writ of certiorari to review a judgment of the United States Court of Appeals for the Sixth Circuit that the State of Tennessee does not enjoy Eleventh Amendment immunity from claims by private individuals under Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12131, *et seq.*, if the claim purports to arise from a due process-type violation.

OPINIONS BELOW

The amended opinion of the court of appeals (App. 1-5) is reported at 315 F.3d 680 (6th Cir. 2003). The original opinion of the court of appeals (App. 10-11) and the order of the district court denying petitioner's motion to dismiss (App. 6-7) are unreported.

JURISDICTION

The initial judgment of the court of appeals was entered on July 16, 2002. A timely petition for rehearing was filed on August 29, 2002. The petition for rehearing was granted, and an amended opinion was entered on January 10, 2003. On March 4, 2003, Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including May 12, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Eleventh Amendment of the United States Constitution provides:

> The judicial power of the United States shall not be construed to extend to any suit in law or in equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

U.S. CONST. amend. XI.

The Fourteenth Amendment of the United States Constitution provides in pertinent part:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> . . .
>
> Section 5. The congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

U.S. CONST. amend. XIV.

Title II of the Americans with Disabilities Act of 1990 provides in pertinent part:

> (1) Public entity
>
> The term "public entity" means –
>
> (A) any State or local government;
>
> (B) any department, agency, special purpose district, or other instrumentality of a State or States or local government; . . .

42 U.S.C. § 12131.

Title II further provides:

> Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12132.

STATEMENT OF THE CASE

Respondents George Lane and Beverly Jones filed this suit in the United States District Court for the Middle District of Tennessee against the State of Tennessee and twenty-five Tennessee counties on August 10, 1998. The Complaint alleged that Defendants have violated Title II of the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. § 12131, *et seq.*, and its regulations, 28 C.F.R. Part 35.101, *et seq.*, as more fully described below. (App. 12-28).

Respondent Lane alleged that he was denied access to the General Sessions Courts of Polk County when he was a defendant in a criminal action. (App. 15-17). Respondent Jones, a certified court reporter, alleged that she has been

denied access to the courthouses in Trousdale, Jackson, Clay and Pickett Counties for the purposes of transcribing trials and other matters and has lost work as a court reporter and the opportunity to participate in the judicial process. (App. 19-20). Respondents contended that the State of Tennessee administers its judicial functions in the county courthouses of each county of the state and that it has failed to comply with the Department of Justice regulations under the ADA found at 28 C.F.R. Part 35. (App. 20). Both respondents alleged that they have each been excluded from participation in the services offered by the county courthouses and denied equal access to the court proceedings of the State of Tennessee. (App. 23). Respondents also requested that the district court certify this case as a class action and certify them as class representatives pursuant to Rule 23, FED. R. CIV. P., on behalf of all individuals residing in the State of Tennessee who are qualified individuals with a physical disability that prevents them from climbing stairs or walking up steep inclines in the courthouses of the named defendants. (App. 25-26). Respondent Lane sought monetary damages for humiliation and embarrassment in an amount not to exceed $100,000. (App. 27). Respondent Jones sought monetary damages for humiliation and embarrassment and lost income in an amount not to exceed $250,000. *Id.* Respondents also requested that the district court compel the State of Tennessee and the counties to comply with the provisions of the ADA. (App. 28). Finally, respondents sought monetary damages for themselves as class representatives of the putative class they seek to represent and for each class member for humiliation and embarrassment. *Id.*

The State of Tennessee moved to dismiss the claims against it on the ground that Eleventh Amendment sovereign immunity protects it from suits for money damages under Title II of the ADA. By order entered November 10, 1998, the district court denied the motion without comment (App. 6-7), and the State of Tennessee immediately appealed that order to the Sixth Circuit Court of Appeals.

On motion of the State, the matter was consolidated for submission with two other cases pending before the Sixth Circuit. *Johnson v. State Technology Ctr. at Memphis* (6th Cir. No. 98-6475) and *Parr v. Middle Tenn. State Univ.* (6th Cir. No. 98-6701). Oral argument in the consolidated cases was further consolidated for argument with four other cases.[1] The cases were collectively heard by the Sixth Circuit on October 26, 1999, at which time the panel took them under advisement. On April 17, 2000, this Court granted review in *Board of Trustees of the University of Alabama v. Garrett*, on the issues of whether Title I and Title II of the ADA are valid exercises of Congress's authority to abrogate the states' sovereign immunity. 529 U.S. 1065 (2000).

On April 28, 2000, the Sixth Circuit panel issued an order holding the cases in abeyance pending this Court's decision in *Garrett*. On September 18, 2000, before this Court's decision in *Garrett*, another panel of the Sixth

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[1] *Satterfield v. Tennessee* (6th Cir. No. 98-5765); *Nihiser v. Ohio Envtl. Protection Agency* (6th Cir. No. 97-3933); *Wright v. Lima Correctional Inst.* (6th Cir. No. 97-3587); and *Pomeroy v. Western Mich. Univ.* (6th Cir. No. 97-1751).

Circuit issued its opinion in another pending case presenting the issue of the states' Eleventh Amendment immunity from suit under Title II of the ADA. *Popovich v. Cuyahoga County Court of Common Pleas*, 227 F.3d 627 (6th Cir.), *rehearing en banc granted, opinion vacated* (6th Cir. 2000), *on rehearing en banc*, 276 F.3d 808 (6th Cir.), *cert. denied*, 123 S. Ct. 72 (2002). The original *Popovich* panel held that the plaintiff's Title II claim in that case was barred by Eleventh Amendment immunity. 227 F.3d at 641.

This Court heard oral argument in *Garrett* on October 11, 2000, and issued its opinion on February 21, 2001. The Sixth Circuit granted rehearing en banc in *Popovich* on December 12, 2000, but delayed rehearing pending this Court's decision in *Garrett*.

The en banc court of appeals issued its opinion in *Popovich* on January 10, 2002. A sharply divided court agreed in part with the original panel, holding that "[i]t is clear after *Garrett* that congressional authority under section 5 to enforce the Equal Protection Clause is limited and will not sustain the Disabilities Act as an exception to Eleventh Amendment state immunity." 276 F.3d at 812. The majority, however, distinguished between Title II claims sounding in equal protection and those sounding in due process, concluding that the latter are not barred by the Eleventh Amendment. *Id.* at 813-16.

After the en banc decision in *Popovich* was issued, the panel before whom this case was pending issued a per curiam order affirming the district court's denial of the State's motion to dismiss. Concluding, based on *Popovich*, "that the Eleventh Amendment does not bar Title II claims against state entities that are based upon Fourteenth

Amendment due process principles," the panel determined that respondents' Title II claims were not barred "[b]ecause . . . [they are] based on such due process principles." (App. 11).

On August 29, 2002, the State petitioned for a panel rehearing, arguing that *Popovich* was not controlling because the Complaint, properly analyzed, did not allege due process violations. The petition was granted on September 20, 2002, and the court directed both parties to submit briefs on the issue of whether respondents' claims were based on due process principles. (App. 8). On January 10, 2003, the panel issued an amended opinion affirming the decision of the district court and remanding the case for further proceedings. (App. 1-5). Noting that "[a]mong the rights protected by the Due Process Clause of the Fourteenth Amendment is the right of access to the courts" (App. 3), the court, without citation to authority, asserted that "[t]he evidence before Congress when it enacted Title II of the [ADA] established that physical barriers in government buildings, including courthouses and in the courtrooms themselves, have had the effect of denying disabled people the opportunity to access vital services and to exercise fundamental rights guaranteed by the Due Process Clause" (App. 3-4), and that Congress enacted Title II as an appropriate means "'to guarantee meaningful enforcement' of the constitutional rights of the disabled," including "the right of access to the courts." (App. 4, quoting *Popovich*, 276 F.3d at 815-16).

Turning to the allegations of the Complaint, the panel concluded that both respondents were seeking to redress due process-type violations of Title II: "Jones and Lane are seeking to vindicate their right of access to the courts in Tennessee. Lane alleges that he has been denied the

benefit of access to the courts. Jones similarly alleges that she has been excluded from courthouses and court proceedings by an inability to access the physical facilities." (App. 5). The court declined to answer the State's contention that respondents' allegations, particularly those made by Jones, were based upon equal protection principles. *Id.* "The difficult questions presented by this case cannot be clarified absent a factual record," the court observed. *Id.* And, because the case came to the Sixth Circuit "before any development of the facts," a remand to the district court for further proceedings was deemed appropriate. *Id.*

On the State's motion, the court of appeals stayed the mandate pending the filing and disposition of this petition for a writ of certiorari.

REASONS FOR GRANTING THE PETITION

This Court has granted certiorari three times on the first question presented by this petition.[2] Each time the issue has been taken up by this Court, it has evaded review. Once again, this petition squarely raises the issue and the State of Tennessee urges this Court to grant the petition and resolve the issue of the states' Eleventh

[2] In 1998, in determining whether inmates in state prisons were covered by Title II, this Court held that state prisons fall within the definition of "public entity." *Pennsylvania Dep't of Corrections v. Yeskey*, 524 U.S. 206 (1998). However, the Court expressly declined to resolve the issue of "whether application of the ADA to state prisons is a constitutional exercise of Congress' power under . . . , § 5 of the Fourteenth Amendment" because it had not been addressed by the Court of Appeals. *Id.* at 212.

Amendment immunity from suits for money damages brought by private individuals under Title II of the ADA.

In 2000, this Court agreed to review the Eighth Circuit's en banc decision holding that Congress had not validly abrogated the states' Eleventh Amendment immunity with Title II of the ADA. *Alsbrook v. City of Maumelle*, 184 F.3d 999 (8th Cir. 1999) (*en banc*), *cert. granted*, 528 U.S. 1146, *cert. dismissed*, 529 U.S. 1001 (2000). However, certiorari was dismissed by agreement of the parties.

Then, this Court granted certiorari in *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001), to decide whether state employees can bring a private action against their employer under Title I and/or Title II of the ADA. However, after argument, the Court determined that the parties had not addressed the issue of whether state employees can sue under Title II and dismissed the Title II portion of the writ as improvidently granted. *Id.* at 360 n.1.

Most recently, this Court granted review in *Medical Board of California v. Hason* on the question whether the "Eleventh Amendment bar[s] suit under Title II of the ADA against the California Medical Board for denial of a medical license based on the applicant's mental illness." 123 S. Ct. 561 (2002). However, that petition was dismissed on the motion of the State of California. 123 S. Ct. 1779 (2003).

This case presents yet another opportunity for the Court to decide the question whether the states enjoy Eleventh Amendment immunity from suits for money damages brought by private individuals under Title II of the ADA. Previously, the United States has acknowledged that this issue "is an important question that may merit

review by this Court at the appropriate time and in the appropriate case." Brief for the United States in Opposition at 6, *Thompson v. Colorado*, *cert. denied*, 122 S. Ct. 1960 (2002) (No. 01-1024) (footnote omitted). As we now show, the need for this Court's authoritative guidance concerning this important issue of constitutional law has not abated since the recent dismissal in *Hason*, and this is the appropriate time and case for review by this Court.

I. There Is a Clear Split among the Circuits Concerning Whether, under Title II of the ADA, Congress Has Validly Abrogated State Sovereign Immunity under the Eleventh Amendment.

This Court should grant review in order to settle the disagreement among the lower courts concerning whether Congress validly abrogated the states' Eleventh Amendment immunity in enacting Title II of the Americans with Disabilities Act. After this Court's decision in *Garrett*, holding that the states are immune from suits for money damages under Title I of the ADA, the lower circuit courts have struggled to address Title II in relation to the Eleventh Amendment. Currently, there is a four-way circuit split.[3] While the majority of the circuits have held that the

[3] The First and Third Circuits have not addressed the issue but will do so shortly. In *Kiman v. New Hampshire Dep't of Corrections*, 301 F.3d 13 (1st Cir. 2002), a panel of the First Circuit held that an individual plaintiff could bring an action under Title II only as Title II "is applied to cases in which a court identified a constitutional violation by the state." *Id.* at 24. However, that opinion was vacated because the First Circuit has granted rehearing en banc. Oral argument is set for June 5, 2003. In addition, this issue has been briefed and is set to be argued before the Third Circuit during the week of July 7, 2003, in

(Continued on following page)

states have sovereign immunity from claims for monetary damages under Title II, the Sixth Circuit has joined the Second Circuit in holding that Title II plaintiffs may overcome state immunity in certain factual circumstances, while the Ninth Circuit simply allows all claims against public entities.

The five circuits holding that the states have immunity from claims under Title II have addressed the issue in similar fashion. The Fourth Circuit held "that Congress did not have an adequate record of unconstitutional discrimination by states against the disabled to support abrogation." *Wessel v. Glendening*, 306 F.3d 203, 213 (4th Cir. 2002). Thus, the Fourth Circuit concluded "that Congress did not validly abrogate the sovereign immunity of the states when it enacted Part A of Title II of the ADA." *Id.* at 215. The Fifth Circuit also held that Congress "has not validly acted through its Fourteenth Amendment Section 5 power to abrogate state sovereign immunity" under Title II of the ADA. *Reickenbacker v. Foster*, 274 F.3d 974, 984 (5th Cir. 2001).

The Tenth Circuit directly considered the plaintiffs' claim that the ADA enforces both the Equal Protection Clause and the Due Process Clause in *Thompson v. Colorado*, 278 F.3d 1020 (10th Cir. 2001), *cert. denied*, 535 U.S. 1077 (2002). The Tenth Circuit held that it could not "conclude that Congress 'identified a history and pattern' of unconstitutional discrimination by the states against the disabled . . . or extensive litigation and discussion of

Bowers, etc. v. National Collegiate Athletic Ass'n, etc., et al. (3d Cir. Nos. 01-4226/4492 & 02-1789).

the constitutional violations." *Id.* at 1034. Thus, the Tenth Circuit held that Title II is not "preventive or remedial legislation that is congruent and proportional to any constitutional violation." *Id.* In the Tenth Circuit, therefore, Title II ADA claims under either the Equal Protection or Due Process Clauses are explicitly barred.

Before this Court's decision in *Garrett*, the Seventh Circuit issued *Walker v. Snyder*, 213 F.3d 344 (7th Cir. 2000), *cert. denied sub nom. United States v. Snyder*, 531 U.S. 1190 (2001), which appears to hold that claims for reasonable modifications under Title II of the ADA are barred. *Walker* also held that *Ex parte Young*, 209 U.S. 123 (1908), did not authorize suits for injunctive relief against state officials under Title II of the ADA. The Seventh Circuit later determined that the latter holding was overruled by *Garrett*. *See Bruggeman v. Blagojevich*, 324 F.3d 906, 912-13 (7th Cir. 2003). However, *Walker's* holding barring monetary claims against the States appears to remain good law.

Also before this Court's decision in *Garrett*, the Eighth Circuit held in *Alsbrook v. City of Maumelle*, 184 F.3d 999, 1010 (8th Cir. 1999) (*en banc*), *cert. granted*, 528 U.S. 1146, *cert. dismissed*, 529 U.S. 1001 (2000), "that the extension of Title II of the ADA to the states was not a proper exercise of Congress's power under section 5 of the Fourteenth Amendment. Consequently, there is no valid abrogation of Arkansas' Eleventh Amendment immunity from private suit in federal court and the district court lacked subject matter jurisdiction over the ADA claim."

Contrary to the well-reasoned opinions in the above circuits, the Second, Sixth and Ninth Circuits have failed to apply *Garrett* to cases brought by private plaintiffs

against state entities under Title II. The Second Circuit held that certain factual patterns will allow a plaintiff to defeat state immunity and bring an action for money damages against a state. *Garcia v. S.U.N.Y. Health Sciences Ctr. of Brooklyn*, 280 F.3d 98 (2d Cir. 2001). The Second Circuit focused on Title II's remedial scheme. *Id.* at 111. Unlike Title I, which incorporates the remedial scheme of Title VII, Title II of the ADA incorporates the remedial scheme found in the Rehabilitation Act, which incorporates Title VI's remedial scheme and which has only a judicially implied private cause of action. *Id.* The Second Circuit held that it had the latitude, indeed was required, to shape a remedial scheme that would comply with Congress's constitutional authority. *Id.* Thus, in the Second Circuit, private individuals may sue an unconsenting state for violation of Title II if "the plaintiff can establish that the Title II violation was motivated by either discriminatory animus or ill will due to disability." *Id.* at 112. "[A] plaintiff may rely on a burden-shifting technique similar to that adopted in *McDonnell Douglas Corp. v. Green* or a motivating-factor analysis similar to that set out in *Price Waterhouse v. Hopkins*." *Id.* (citations omitted).

The Ninth Circuit stands in complete opposition to the other circuits. Before *Garrett*, the Ninth Circuit held that Title II of the ADA is a valid abrogation by Congress of the states' Eleventh Amendment immunity. *Dare v. California*, 191 F.3d 1167, 1173-74 (9th Cir. 1999), *cert. denied*, 531 U.S. 1190 (2001); *Clark v. California*, 123 F.3d 1267, 1270-71 (9th Cir. 1997). In more recent decisions, the Ninth Circuit has specifically declined to reexamine Title II under the analysis required by this Court in *Garrett* and continues to apply its pre-*Garrett* holdings to Title II. *Hason v. Medical Bd. of Cal.*, 279 F.3d 1167, 1171 (9th

Cir.), *cert. granted in part*, 123 S. Ct. 561 (2002), *cert. dismissed*, 123 S. Ct. 1779 (2003). "[W]e . . . conclude that *Garrett* does not overrule either *Clark* or *Dare*, and that the Eleventh Amendment does not bar . . . Title II claims." *Id.* at 1172. Thus, in the Ninth Circuit, private individuals may bring claims for monetary damages against the states. Indeed, the Ninth Circuit has held that Title II "brings within its scope anything a public entity does." *Wroncy v. Oregon Dep't of Transp.*, 9 Fed. Appx. 604, 606 (9th Cir. 2001) (citations omitted).

Thus, in the Fourth, Fifth, Seventh, Eighth, and Tenth Circuits, the states are immune from claims for monetary damages brought by private individuals under Title II of the ADA. However, in the Sixth Circuit, the states have immunity only in cases alleging an equal protection-type violation and in the Second Circuit, the states are protected only if the plaintiff does not allege actual intent to discriminate. Finally, in the Ninth Circuit, the states are completely unprotected from private claims for monetary damages under Title II.

Clearly, there is a substantial split among the lower courts warranting this Court's intervention. As a result of this split, the extent of Eleventh Amendment immunity enjoyed by a state depends completely upon the circuit in which it is located. Plaintiffs and states alike have no certainty so long as this important issue remains unresolved. The variety of approaches used by the circuits adds to the confusion. Only this Court can finally settle the matter.

II. The Sixth Circuit's "As-Applied" Analysis Announced in *Popovich* and Employed in This Case Conflicts with This Court's Decisions Delimiting Congress's Section 5 Authority to Abrogate Eleventh Amendment Immunity.

In this case, the Sixth Circuit applied its holding in *Popovich v. Cuyahoga County Court of Common Pleas*, 276 F.3d 808 (6th Cir.) (*en banc*), *cert. denied*, 123 S. Ct. 72 (2002), to conclude that the State of Tennessee does not have Eleventh Amendment immunity from a potential class action[4] by mobility-impaired persons seeking physical access to the county courthouses in Tennessee. The Sixth Circuit's analysis in *Popovich* and applied in this case is fatally flawed.

In *Board of Trustees of the University of Alabama v. Garrett*, this Court held that Congress exceeded its power under the Fourteenth Amendment in abrogating the states' Eleventh Amendment immunity from suits brought under Title I of the ADA, concerning employment. 531 U.S. at 374. The Court found that Title I did not fall under Congress's power to enforce constitutional rights, as Title I created rights and remedies far beyond what the Constitution requires, and Congress was not responding to a pattern of previous constitutional violations by the states. *Id.*

In *Garrett*, this Court accurately describes its section 5 analysis as a set of "now familiar principles." *Id.* at 365.

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[4] Although Plaintiffs moved for class certification in their Complaint, the district court has not yet ruled on the issue. That issue, like all others in this case, was stayed while the State of Tennessee pursues this appeal.

There are several steps required to determine whether a given enactment is justified by Congress's power under section 5 of the Fourteenth Amendment, to enforce constitutional guarantees. First, the Court "identif[ies] with some precision the scope of the constitutional right at issue." *Id.* Second, the Court "examine[s] whether Congress identified a history and pattern of unconstitutional" state action in the area in question (such as employment discrimination against the disabled), because Congress's section 5 power "is appropriately exercised only in response to state transgressions." *Id.* at 368. Third, whether the alleged "pattern" of State misbehavior seems great or small, the Court compares Congress's statutory remedial scheme to the constitutional problem it addresses in order to determine if it is "congruent and proportional." *Id.* at 374.

In an unbroken line of cases, this Court has applied the congruence and proportionality test in examining whether Congress exceeded its powers under section 5 of the Fourteenth Amendment in abrogating the states' Eleventh Amendment immunity. *See id.* at 360 (ADA Title I); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000) (Age Discrimination in Employment Act); *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627 (1999) (Patent Remedy Act); *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999) (Trademark Remedy Clarification Act); *City of Boerne v. Flores*, 521 U.S. 507 (1997) (Religious Freedom Restoration Act). In each of these cases, this Court held that the statute in question was not a valid exercise of Congress's section 5 enforcement power, because Congress was not responding to a pattern of state

constitutional violations, and each statute granted rights and remedies beyond what the Constitution requires.

In doing so, this Court reviewed and rejected each challenged statute on its face, not in an "as-applied" context such as the approach utilized by the Sixth Circuit. This Court has never looked to any individual claim or measured any particular plaintiff's claim against the relevant constitutional guarantee. Title II should be subject to the same form of analysis performed by this Court in *Garrett*.

In *Garrett*, for example, this Court compared Title I's *statutory provisions* to the Constitution's equal protection guarantees – it did not compare Ms. Garrett's specific allegations to the constitutional standard. *Garrett*, 531 U.S. at 365-68. In contrast, the Sixth Circuit addressing Title II stated, "[i]n defining the 'metes and bounds' of the constitutional right before us, we must consider whether plaintiff's due process-type claim to participate fully in the hearing in his child custody suit is an exception to Eleventh Amendment immunity." *Popovich*, 276 F.3d at 813. Similarly, applying *Popovich* to the instant case, the Sixth Circuit determined that respondents may be able to sue the State of Tennessee under Title II, because their particular claims implicate a due process "right of access to the courts." (App. 5). The Sixth Circuit has now remanded the case to the district court for further factual development to test that hypothesis. *Id.* The end result of the Sixth Circuit's analysis in this case is that respondents' specific factual allegations will determine whether Congress validly abrogated Tennessee's Eleventh Amendment immunity when it enacted Title II of the ADA. This does not comply with *Garrett*.

Moreover, the very process of additional fact-finding envisioned by the Sixth Circuit's amended order remanding this case to the district court will irretrievably strip Tennessee of most of the protections the Eleventh Amendment was intended to secure, *i.e.*, immunity from suit, not simply immunity from liability. This Court has long recognized that the states' Eleventh Amendment immunity is immunity not just from liability but from suit itself. *See Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy*, 506 U.S. 139, 146-47 (1993) and cases cited therein.

The lack of an adequate legislative history to support the viability of Title II of the ADA is apparent. Had the Sixth Circuit followed this Court's guidance in *Garrett*, it would have been constrained to reach the conclusion that respondents may not sue Tennessee. Title II is grounded on the same provisions and legislative history that this Court found inadequate to support abrogation in *Garrett*. *See Wessel*, 306 F.3d at 213; *Alsbrook*, 184 F.3d at 1009.

As discussed above, the Second Circuit's analysis of Title II of the ADA in *Garcia* suffers from some of the same problems as the Sixth Circuit's *Popovich* analysis. Thus, the harms of the as-applied approach are not confined to the Sixth Circuit. For this reason, this Court should not only resolve the four-way split over the states' Eleventh Amendment immunity under Title II of the ADA, but should also resolve whether section 5 analysis should ever take this as-applied form.

This Court should take this opportunity to finally resolve the issue of whether the states have Eleventh Amendment immunity from suits for money damages brought by private individuals under Title II of the ADA.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: May 12, 2003

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206
ELECTRONIC CITATION: 2003 FED App. 0010A (6th Cir.)
File Name: 03a0010a.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GEORGE LANE; BEVERLY JONES
Plaintiffs-Appellees,
UNITED STATES OF AMERICA,
Intervenor,
v.
STATE OF TENNESSEE,
Defendant-Appellant,
POLK COUNTY, TENNESSEE, et al.,
Defendants.

No. 98-6730

On Petition for Rehearing of an
Appeal from the United States District Court
for the Middle District of Tennessee at Nashville.
No. 98-00731—Thomas A. Higgins, District Judge.

Decided and Filed: January 10, 2003

Before: MARTIN, Chief Circuit Judge;
SUHRHEINRICH and SILER, Circuit Judges.

COUNSEL

ON BRIEF: Mary M. Collier, S. Elizabeth Martin, OFFICE OF THE ATTORNEY GENERAL, CIVIL LITIGATION & STAFF [sic] SERVICES DIV., Nashville, Tennessee, for Appellant, William J. Brown, WILLIAM J. BROWN & ASSOCIATES, Cleveland, Tennessee, for Appellees. Seth M. Galanter, Sarah E. Harrington, UNITED STATES DEPARTMENT OF JUSTICE, CIVIL RIGHTS DIVISION, Washington, D.C., for Intervenor.

AMENDED OPINION

BOYCE F. MARTIN, JR., Chief Circuit Judge. This Court initially issued an opinion in this case on July 16, 2002. We held that Lane and Jones stated claims founded in due process violations, and, under *Popovich v. Cuyahoga County Court of Common Pleas,* 276 F.3d 808 (6th Cir. 2002) (en banc) *cert. denied,* 123 S.Ct. 72 (October 7, 2002), Tennessee and the other state defendants were not immune from Lane and Jones's damages claims under Title II of the Americans with Disabilities Act. On September 20, we granted the State of Tennessee's motion for panel rehearing. All parties submitted supplemental briefs. Tennessee argued that Lane and Jones's claims are not based on due process violations and that Tennessee therefore enjoys Eleventh Amendment immunity from suit on those claims. On rehearing and for the following reasons, we AFFIRM the district court's denial of Tennessee's motion to dismiss and REMAND this case for further proceedings.

In *Popovich,* we considered the validity of the abrogation of a state's immunity to suit by private parties under Title II of the Americans with Disabilities Act. Guiding our hand through our evaluation was the Supreme Court's recent decision in *University of Alabama v. Garrett,* 531 U.S. 356 (2001), in which the Supreme Court affirmed that Section Five of the Fourteenth Amendment grants Congress the power to abrogate the Eleventh Amendment immunity of the states to private damage suits. We held that the Eleventh Amendment barred claims under Title II of the Americans with Disabilities Act based on equal protection violations but Congress could abrogate Eleventh Amendment immunity as to due process claims.

Among the rights protected by the Due Process Clause of the Fourteenth Amendment is the right of access to the courts. For criminal defendants like Lane, the Due Process Clause has been interpreted to provide that "an accused has a right to be present at all stages of the trial where his absence might frustrate the fairness of the proceedings." *Faretta v. California,* 422 U.S. 806, 819 n.15 (1975). Parties in civil litigation have an analogous due process right to be present in the courtroom and to meaningfully participate in the process unless their exclusion furthers important governmental interests. *See Popovich,* 276 F.3d at 813-14; *Helminski v. Ayerst Labs.,* 766 F.2d 208, 213 (6th Cir.), *cert. denied,* 474 U.S. 981 (1985). Further, those who fail to appear in court may not be sanctioned for failing to appear until they have been accorded due process. *Groppi v. Leslie,* 404 U.S. 496, 502 (1972). These guarantees are protective of equal justice and fair treatment before the courts.

The evidence before Congress when it enacted Title II of the Americans with Disabilities Act established that

physical barriers in government buildings, including courthouses and in the courtrooms themselves, have had the effect of denying disabled people the opportunity to access vital services and to exercise fundamental rights guaranteed by the Due Process Clause. In *Popovich,* we found that Title II was enacted "to guarantee meaningful enforcement" of the constitutional rights of the disabled. 276 F.3d at 815-16. In doing so, Congress may require states to consider the nature of the constitutional right at issue, the often relatively small cost of compliance, and the effect of failure to accommodate those with disabilities. In the context of the case before us, Congress could ask states to weigh the fundamental importance of access to the courts to our justice system, that the perpetuation of the current physical barriers force people with disabilities to either forgo their right to be present in court or be carried into court, and that the remedy is often inexpensive and simple.

Based on the record before Congress in considering the Americans with Disabilities legislation, it was reasonable for Congress to conclude that it needed to enact legislation to prevent states from unduly burdening constitutional rights, including the right of access to the courts. States have myriad ways to unburden these rights, from the major step of renovating facilities to the relatively minor step of assigning aides to assist in access to the facilities. The record demonstrated that public entities' failure to accommodate the needs of qualified persons with disabilities may result directly from unconstitutional animus and impermissible stereotypes. Title II ensures that the refusal to accommodate an individual with a disability is genuinely based on unreasonable cost or

actual inability to accommodate, not on inconvenience or unfounded concerns about costs.

This statutory protection is a preventive measure commensurate to the gravity of precluding access to the courts by those with disabilities. In addition, these requirements are carefully tailored to the unique features of disability discrimination that persists in public services. A simple ban on discrimination against those with disabilities lacks teeth. The continuing legacy of discrimination is too powerful. Title II affirmatively promotes integration of those with disabilities.

Jones and Lane are seeking to vindicate their right of access to the courts in Tennessee. Lane alleges that he has been denied the benefit of access to the courts. Jones similarly alleges that she has been excluded from courthouses and court proceedings by an inability to access the physical facilities. Tennessee responds that the violations alleged are not due process violations. The difficult questions presented by this case cannot be clarified absent a factual record. Because in *Popovich* we held that Title II is an appropriate means of enforcing the due process rights of individuals, and because this case came to us before any development of the facts, we hold that the district court appropriately denied Tennessee's motion to dismiss this action.

We AFFIRM the decision of the district court and REMAND for further proceedings consistent with this opinion.

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
AT NASHVILLE

GEORGE LANE and BEVERLY JONES,	)	
Plaintiffs,	)	No. 3:98 CV 0731
v.	)	Judge Higgins
STATE OF TENNESSEE, and its political subdivisions, POLK COUNTY, BLEDSOE COUNTY, CANNON COUNTY, CHESTER COUNTY, COCKE COUNTY, DECATUR COUNTY, FAYETTE COUNTY, GRAINGER COUNTY, HANCOCK COUNTY, HAWKINS COUNTY, HICKMAN COUNTY, HOUSTON COUNTY, JACKSON COUNTY, LAKE COUNTY, LEWIS COUNTY, MEIGS COUNTY, MOORE COUNTY, PERRY COUNTY, PICKETT COUNTY, TROUSDALE COUNTY, and VAN BUREN COUNTY,	)	Magistrate Griffin
Defendants.	)	

DEFENDANT STATE OF TENNESSEE'S MOTION TO DISMISS

(Filed Oct. 5, 1998)

Defendant, State of Tennessee, pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, moves this Court to dismiss the claims against Defendant State of

Tennessee. Plaintiff's claims under the Americans with Disabilities Act, 42 U.S.C. § 12131 *et seq.*, its regulations, 28 C.F.R. 35.10 *et seq.* and the Rehabilitation Act, 29 U.S.C. § 794a are barred by the Eleventh Amendment to the United States Constitution. Congress did not have the constitutional authority to make either the ADA or the Rehabilitation Act applicable to the states.

* * *

This document was entered on the docket in compliance with Rule 58 and/or Rule 79(a), FRCP, on 11-12-98
By /s/ TLC.

[Order
Motion denied
/s/ Thomas A. Higgins
USDJ/11-10-98]

No. 98-6730

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GEORGE LANE, et al, Plaintiffs-Appellees	)	
UNITED STATES OF AMERICA, Intervenor	)	ORDER
v.	)	(Filed Sep. 20, 2002)
STATE OF TENNESSEE, Defendant-Appellant	)	
POLK COUNTY, et al., Defendants	)	

Before: MARTIN, Chief Circuit Judge; SUHRHEINRICH and SILER, Circuit Judges

Upon the petition of the appellant State of Tennessee for panel rehearing of the court's decision in the appeal noted above, and the court having found the petition to be well taken; it is

ORDERED that the petition for rehearing is hereby GRANTED. The opinion and judgment of July 16, 2002 are hereby withdrawn, and the case is restored to the court's active docket. The parties are further instructed to file briefs not in excess of 25 pages addressing the issue as outlined in the petition for rehearing, with each side's brief to be filed not later than the close of business on Wednesday, October 23, 2002. Upon the filing of the briefs the court will proceed to dispose of the case.

ENTERED BY ORDER OF
THE COURT

/s/ Leonard Green
Leonard Green, Clerk

NOT RECOMMENDED FOR
FULL-TEXT PUBLICATION

No. 98-6730

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GEORGE LANE and
BEVERLY JONES,

Plaintiffs-Appellees,

v.

STATE OF TENNESSEE,
et al.,

Defendants-Appellants.

ON APPEAL FROM THE
UNITED STATES
DISTRICT COURT FOR
THE MIDDLE DISTRICT
OF TENNESSEE

NOT RECOMMENDED
FOR FULL-TEXT
PUBLICATION

Sixth Circuit Rule 28(g) limits citation to specific situations. Please see Rule 28(g) before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court.

This notice is to be *prominently* displayed if this decision is reproduced.

(Filed Jul. 16, 2002)

BEFORE: MARTIN, Chief Circuit Judge, SUHRHEINRICH and SILER, Circuit Judges

PER CURIAM. Plaintiffs are paraplegics who sued the State of Tennessee under Title II of the Americans with Disabilities Act because they were unable to access the second floors of many county courthouses in the state.

Tennessee filed a motion to dismiss, claiming Eleventh Amendment Immunity. The district court denied the motion and Tennessee appealed.

In *Popovich v. Cuyahoga County Court of Common Pleas*, 276 F.3d 808, 816-18 (6th Cir. 2002), this court held that the Eleventh Amendment does not bar Title II claims against state entities that are based on Fourteenth Amendment due process principles. *See also Trustees of University of Alabama v. Garrett*, 531 U.S. 356, 121 S.Ct. 955, 148 L.Ed.2d 866 (2001). Because plaintiffs' Title II claim is based on such due process principles, we AFFIRM the district court's denial of Tennessee's motion to dismiss and REMAND this case for further proceedings consistent with *Popovich*.

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
AT NASHVILLE

GEORGE LANE and BEVERLY JONES	)	
Plaintiffs	)	No. _____ 3 98-0731
v.	)	
STATE OF TENNESSEE, and its political subdivisions, POLK COUNTY, BLEDSOE COUNTY, CANNON COUNTY, CHESTER COUNTY, CLAIBORNE COUNTY, COCKE COUNTY, DECATUR COUNTY, FAYETTE COUNTY, GRAINGER COUNTY, HANCOCK COUNTY, HAWKINS COUNTY, HICKMAN COUNTY, HOUSTON COUNTY, JACKSON COUNTY, JEFFERSON COUNTY, JOHNSON COUNTY, LAKE COUNTY, LEWIS COUNTY, MEIGS COUNTY, MOORE COUNTY, PERRY COUNTY, PICKETT COUNTY, TROUSDALE COUNTY, and VAN BUREN COUNTY	)	JUDGE HIGGINS
Defendants.	)	

COMPLAINT

(Filed Aug. 10, 1998)

Comes the plaintiffs, George Lane and Beverly Jones, by and through counsel, who would hereby sue the defendants noted above and for cause would show as follows:

I.

PARTIES

(a) The Plaintiff George Lane: The plaintiff Lane is a citizen and resident of Polk County, Tennessee. He is a qualified individual with a disability as is defined by 42 U.S.C. 12131(2) in that he is a paraplegic and is and has been in need of the services of the judicial division of the State of Tennessee and its political subdivisions. It is hereby requested that he be allowed to serve as a class representative for all qualified individuals with a disability needing the services of the judicial division of the State of Tennessee and its political subdivisions.

(b) The Plaintiff Beverly Jones: The plaintiff Jones is a citizen and resident of Macon County, Tennessee and resides at 143 Carter Circle, Woodland Estates, Lafayette, Tennessee. She is a qualified individual with a disability as is defined by 42 U.S.C. 12131(2) in that she is a paraplegic and confined to a wheelchair. Plaintiff Jones is a certified court reporter who makes her living by attending judicial proceedings throughout the State of Tennessee and recording those proceedings on behalf of attorneys and parties that present their cases before the courts of this State. She is, and has been, in need of the services of the judicial division of the State of Tennessee and its political subdivisions for the purpose of supporting herself and her family by being allowed to attend court proceedings and transcribing those proceedings. It is hereby requested that she be allowed to serve as a class representative for all qualified individuals with a disability needing the services of the judicial division of the State of Tennessee and its political subdivisions.

(c) The Defendants: The State of Tennessee is a political subdivision of the United States of American and as such it and its political subdivisions are subject to the laws of the United States of America. They are specifically charged under the terms of the United States Constitution and the Tennessee Constitution with providing the service of courts and judicial proceedings and other manifestations of that process such as courtrooms, clerk's offices and public meeting rooms that are conducted in the courthouses of the State of Tennessee. Polk County, Bledsoe County, Cannon County, Chester County, Claiborne County, Clay County, Cocke County, Decatur County, Fayette County, Grainger County, Hancock County, Hawkins County, Hickman County, Jackson County, Jefferson County, Johnson County, Lake County, Lewis County, Meigs County, Moore County, Perry County, Pickett County, Trousdale County, and Van Buren County are all political subdivisions of the State of Tennessee and are required under the Constitution of the State of Tennessee to provide courthouses that provide services to all persons including citizens of this State and qualified individuals with disabilities as definded [sic] by 42 U.S.C. 12131. Don Sundquist is the chief executive officer of the State of Tennessee. Each of the named counties has an individual county executive upon whom service of process shall be provided.

II.

JURISDICTION

This court has jurisdiction over the matters contained in this complaint pursuant to the provisions of the Americans with Disability Act (ADA) 42 U.S.C. 12131 et seq., 29 U.S.C. 794a and 28 C.F.R. 35.101 et seq.

III.

PLAINTIFF LANE'S PROCEDURAL HISTORY

(a) That as noted above, the plaintiff, George Lane is a paraplegic and as such is a qualified individual with a disability as defined by 42 U.S.C. 12131(2).

(b) In May and September of 1996, the plaintiff Lane, hereinafter referred to as Lane, had two sets of criminal charges brought against him by law enforcement in Polk County, Tennessee in the name of the State of Tennessee and under the laws of the State of Tennessee. Lane was required by the orders of the court to appear at the Polk County Courthouse in Benton, Tennessee to answer the charges.

(c) All court proceedings and all clerk's offices that support the court systems of Polk County, Tennessee are conducted on the second floor of the courthouse. The only access to the courtrooms and courts, up until June of 1998, was by one of two staircases. Lane was required to crawl up two flights of stairs to get to the courtroom to meet the requirements of his appearance before the General Sessions Court for Polk County, Tennessee. Lane was arraigned and told to appear at a later date for his hearing. Lane appeared and, not desiring to go through the humiliation of crawling up the stairs again, waited on the first floor of the courthouse and sent word to the court that he would not crawl to the courtroom again. Lane also declined to be carried by officers to the courtroom. The court issued an attachment for his arrest, and he was arrested and taken to jail.

(d) Lane was later released from custody and retained counsel to represent him. Thereafter, Lane attended his

court proceedings by waiting downstairs from the courtroom and having his attorney shuttle back and forth with information concerning his case. During this time, Lane did not have an opportunity to view the court processes in any way because of his inability to get to the courtroom.

(e) On February 24, 1997, a preliminary hearing was held in the Courthouse library concerning his charges. This was done over his attorney's objections in that the proceedings were held [sic] a location that was not regularly frequented by the public. His case was bound over to the Polk County Grand Jury.

(f) On March 17, 1997, the Polk County Grand Jury reported two misdemeanor indictments against Lane. On that date Lane's counsel appeared on his behalf advising the court that Lane was on the first floor of the courthouse and could not come to the courtroom because of the requirement to climb the stairs to the courtroom. Counsel then requested the court to continue the arraignment until such time as the courthouse could be made to conform to the requirements of the Americans with Disability Act. The court declined, and without arraigning Lane, set the case for trial.

(g) On or about April 23, 1997, Lane's counsel filed an application for extraordinary appeal to the Tennessee Court of Criminal Appeals raising the issue of Lane's not being able to get to the courtroom and the fact that the courthouse did not accommodate handicapped individuals. The Attorney General for the State of Tennessee argued in his brief that this failure to provide services to Lane should be condoned and that Lane should be required to stand trial at the Polk County Courthouse despite his inability to get to the courtroom. This appeal was denied.

On or about June 24, 1997, Lane filed an application for extraordinary appeal to the Supreme Court of the State of Tennessee. Again, the Attorney General argued to the court that the court should ignore this violation of Lane's rights under the ADA. This appeal was likewise denied on or about September 2, 1997.

(h) On or about December 12, 1997, the Honorable Carroll Ross signed an order holding all criminal proceedings in abeyance until the completion of the construction of an elevator that would permit access to the courtrooms and clerk's offices in the Polk County Courthouse. The construction of this elevator was completed in June of 1998.

(i) Other than the proceeding where Lane crawled to the courtroom and his preliminary hearing in the library, he was unable to attend any court proceedings in the Polk County Courthouse until the installation of the elevator in June of 1998, and has been denied access to the services of the court that are conducted therein.

(j) That the Polk County Courthouse still fails to meet the requirements of the American's with Disabilities Act with reference to access to restroom facilities.

IV.

POLK COUNTY'S HISTORY CONCERNING THE AMERICANS WITH DISABILITY ACT

(a) That on January 26, 1992, regulations were established by the United States Department of Justice that made provisions for State and Local governments of the United States to meet the requirements of the ADA. These regulations were published by the Department of

Justice as 28 C.F.R. Part 35 pursuant to the provisions of 42 U.S.C. 12134. As a part of that regulation, all public entities were required to evaluate its services, policies and practices and the effects thereof and make modifications within one year of the effective date of the regulation. 28 C.F.R. 35.105.

(b) In October of 1992, the Polk County Commission had brought to its attention the requirement of the ADA and the commission appointed a review committee to review the facilities condition. In May of 1993, the ADA Committee for Polk County prepared a Self-Evaluation and analysis and transition plan. This plan specifically found that the county buildings did not conform to the requirements of the ADA. On October 20, 1994, the Polk County Commission specifically voted not to construct an elevator in the courthouse, despite the recommendations of the County ADA Committee.

(c) That Polk County has, as a matter of policy, refused to come into compliance with the ADA until such time as the plaintiff initiated a grievance procedure. This grievance was filed on October 31, 1996. A series of meeting were held with the Grievance Committee and before the Polk County Commission. However, it was not until November of 1997, that the Polk County Commission acted to authorize the construction of an elevator to meet the requirements of the ADA. All the while the plaintiff was compelled to present his defense against these violations in court. While Polk County has constructed an elevator, it still fails to have its courthouse comply with the requirement of the ADA.

(d) Throughout these proceedings, the plaintiff has suffered extreme humiliation and embarrassment, as well

as incurring legal expenses in attempting to resist this illegal and discriminatory activity of the defendant, Polk County, while attempting to resolve this matter through the grievance process.

(e) That there are hundreds of individuals who are similarly situated with George Lane and being handicapped who have had and continue to have a need, requirement, or desire to participate in the judicial process of Polk County, Tennessee.

V.

PLAINTIFF JONES PROCEDURAL HISTORY

(a) Plaintiff Jones, hereinafter referred to as Jones, is a paraplegic confined to a wheelchair because of an automobile accident in 1989. She is currently responsible for the care and support of two minor children. Jones is a certified court reporter. She became certified and has actively worked in her chosen field since 1990. She works out of her home and is called upon by attorneys and other parties to work all over Middle Tennessee in her profession. This specifically includes going to courthouses for the purposes of recording proceedings before the state courts in proceedings conducted in those courthouses. Her inability to gain access to the courtroom has caused her to continue to have difficulty accessing the services of the judiciary.

(b) She has specifically attempted to gain access to the courthouses in Trousdale, Jackson, Clay and Pickett Counties. Jones has not been able to gain access to the courtrooms due to the lack of handicap access to the courtrooms used in those counties. She would also be

prepared to appear in any and all other courthouses of this state to provide services to the courts, attorneys and parties, if called upon to do so.

(c) Jones has specifically brought to the attention of authorities in the four defendant counties, Trousdale, Jackson, Clay and Pickett, their failure to comply with the requirements of the ADA, yet, with the exception of Trousdale County, they have failed to comply with the requirements. Trousdale County installed an elevator in 1998, however the courtroom itself is set up where Jones cannot gain access to the court proceedings. The proceedings occur on an elevated platform to which she cannot gain ready access.

(d) As a direct result of the courthouses located in Trousdale, Jackson, Clay and Pickett Counties of this State not complying with the ADA Jones has lost work and an opportunity to participate in the judicial process because of her inability to gain access to their courthouses.

VI.

THE STATE OF TENNESSEE'S AND OTHER DEFENDANT'S HISTORY CONCERNING THE AMERICANS WITH DISABILITY ACT

(a) That the State of Tennessee administers its judicial functions in the county courthouses of each of the counties of this state. As a part of that function, the State of Tennessee provides services through these buildings to all of its citizens and others. It is in these buildings that virtually all trial level judicial proceedings, civil and criminal, are conducted. In addition, these buildings house clerk's offices where the court's records are maintained. As a part of these proceedings, individuals are called upon to

participate as parties in civil and criminal proceedings, or participate as witnesses and jurors, and go to these offices to take care of public business in the form of filing papers and researching records, and have a fundamental right under the Tennessee State Constitution to participate and view the judicial proceedings that are conducted in those courtrooms.

(b) That like Polk County and the other named defendants, the State of Tennessee is required to conform to the Department of Justice regulations found at 28 C.F.R. Part 35 and is required to do an evaluation of the facilities in which its services are rendered.

(c) That despite this evaluation process and the requirement of the ADA, the State of Tennessee persisted in requiring Lane to participate in services and proceedings in a building that failed to comply with the law, or alternatively not allowing him access to the same services and proceedings of other citizens of the State and County who are not individuals with a disability. This was despite the fact that the officials of the State of Tennessee were repeatedly confronted with the State and county's failure to comply with the ADA. The State of Tennessee has repeatedly failed to comply with the law. Specifically, counsel for the plaintiff Lane raised the ADA issue at every appearance required of plaintiff to the court and the District Attorney General's office. Counsel addressed a letter directly to Charles Burson, Attorney General for the State of Tennessee, on December 4, 1996 after making repeated phone calls to his office. None of these phone calls or the letter were responded to in any way. Plaintiff Lane appealed the State Trial judges requirements to proceed with the case to all levels of the judiciary of the State of Tennessee. Each time, the office of the Attorney

General insisted on ignoring the legal violation and advocating the same to each court, and the State courts specifically ignored the uncontradicted facts that were presented to them.

(d) That the State of Tennessee and other named defendants persist on conducting their judicial proceedings in facilities that do not conform to the requirements of the ADA and as such deny to all citizens similarly situated the right to participate in the judicial process of this State as conducted in the defendant counties. Specifically, the State of Tennessee conducts its judicial proceedings in county courthouses that do not comply with the access requirements of the ADA. Those counties are: Bledsoe County, Cannon County, Chester County, Claiborne County, Clay County, Cocke County, Decatur County, Fayette County, Grainger County, Hancock County, Hawkins County, Hickman County, Jackson County, Jefferson County, Johnson County, Lake County, Lewis County, Meigs County, Moore County, Perry County, Pickett County, Trousdale County, and Van Buren County. There may well be other counties that do not fully comply with the requirements of the ADA. These defendants, like Polk County, have had a duty to comply with the requirement of the law since 1992, yet they have knowingly and intentionally failed to cause their courthouses to conform to the ADA.

(e) That there are thousands of individuals who reside in the State of Tennessee and have a need, as well as a right, to participate in the judicial processes of this State without the obstructions associated with the physical condition of the States Courthouses. In the year 1998, the State of Tennessee had issued over 200,000 handicapped placards for people with physical handicaps.

Despite the fact that the regulations and law of the United States dictates [sic] that these obstructions be eliminated, the State of Tennessee and its subordinate political bodies have failed to bring these buildings into compliance.

VI.

CAUSES OF ACTION

(a) That the State of Tennessee and Polk County have discriminated against the plaintiff, George Lane in that they have excluded him from participation in, or denied him the benefits of, the services of its court systems in violation of 42 U.S.C. 12132.

(b) That the State of Tennessee, Trousdale County, Jackson County, Clay County, and Pickett Counties specifically, and the other defendants generally, have discriminated against the plaintiff Beverly Jones in that they have excluded her from participating in the services offered by the courthouses and access to the Court proceedings of this State by failing to eliminate physical obstacles to her participation in the judicial processes of this State in violation of 42 U.S.C. 12132.

(c) That the State of Tennessee and Bledsoe County, Cannon County, Chester County, Claiborne County, Clay County, Cocke County, Decatur County, Fayette County, Grainger County, Hancock County, Hawkins County, Hickman County, Jackson County, Jefferson County, Johnson County, Lake County, Lewis County, Meigs County, Moore County, Perry County, Pickett County, Trousdale County, and Van Buren County knowingly and intentionally continue to discriminate against George Lane, Beverly Jones and all other individuals similarly situated who

have a need, responsibility, or desire to attend the judicial process of this state as it is conducted in the Courthouses of this State in that they conduct their judicial proceedings in facilities that are not in conformance with the requirements of the ADA. Further, there may be other counties of this State that have failed to fully comply with the requirement of the ADA.

(d) That the actions of the State of Tennessee and Polk Country, Trousdale, Jackson, Clay and Pickett Counties and the other named defendants were conscious, deliberate, and intentional in their active discrimination against the plaintiffs, George Lane and Beverly Jones, and all other similarly situated handicapped individuals of this State. That Polk County's consistent insistence in continuing the prosecution of Lane's case, without delay and despite plaintiff's inability to gain access to the courtroom, was with full knowledge of his disability and their knowledge of the requirement to conform to the ADA.

(e) That the actions of the State of Tennessee, Trousdale County, Jackson County, Clay County, and Pickett County were conscious, deliberate, and intentional in their active discrimination against the plaintiffs, George Lane and Beverly Jones and all other similarly situated handicapped individuals of this State. That their persistent presentation of the actions of the judicial process was with full knowledge of plaintiffs' disability and with their knowledge of the requirements to conform to the ADA.

(f) That the actions of the State of Tennessee and the other defendant counties were conscious, deliberate, and intentional in their active discrimination against all other similarly situated handicapped individuals of this State.

That their persistent presentation of the actions of the judicial process, knowing that handicapped individuals were unable to gain access to the courtrooms, was with full knowledge of their disabilities and their knowing failure to meet the requirements to conform to the ADA.

(g) That in the alternative, the actions of the State of Tennessee and said counties were knowing and resulted from the defendants' negligence in complying with the law.

(h) That as a result of the defendants' actions, the plaintiff Lane has suffered damages in the form of extreme embarrassment, and humiliation and anxiety of the delays associated with this case. In addition, he has incurred attorney fees and expenses including court costs in excess of $600 assessed by the State of Tennessee for his asking the appellate courts of the State of Tennessee to delay his prosecution until the Polk County Courthouse was brought into compliance with the ADA.

(i) That as a result of the defendants' actions, the plaintiff Jones has suffered damages in the form of extreme embarrassment, and humiliation in attempting to gain access to the services provided by the State of Tennessee and Trousdale, Jackson, Clay and Pickett Counties and not being able to be accommodated. In addition, plaintiff has suffered lost wages and earnings associated with her inability to conduct her profession in said counties' courtrooms.

VII.

REQUEST FOR CERTIFICATION AS CLASS ACTION

(a) Now come the plaintiffs, who in addition to bringing this action on behalf of themselves, would request

this court to certify them as class representatives pursuant to the provisions of Rule 23 of the Federal Rules of Civil Procedure, on behalf of all individuals residing in the State of Tennessee who are qualified individuals with a physical disability that prevent them from climbing stairs or walking up steep inclines in the courthouses of the named defendants. These individuals have been subjected to discrimination like the plaintiffs and continue to experience this discrimination and the denial of services. Each of these individuals have [sic] the right to attend judicial proceedings in the courthouses of this state and specifically the named defendant counties and would currently not have access to the judicial processes in the named defendant counties without going through the humiliation and embarrassment that the plaintiffs George Lane and Beverly Jones have been forced to endure. In addition, these individuals may be called or have cause to participate in those proceedings as parties, witnesses or jurors.

(b) Plaintiffs would show that the certification of this class is proper in that (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of fact and law that are common to the class, (3) the claims and defenses of the representative party is [sic] typical of the claims and defenses of the class, and (4) the representative party will fairly and adequately protect the interest of the class.

(c) Plaintiffs would further show that the defendants have acted, or refused to act, on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole. Further, that the questions of fact and fact common to the members of the class predominate over any questions affecting only individual

members. A class action is superior to other available methods for the fair and efficient adjudication of the controversy.

VIII.

REQUEST FOR RELIEF

WHEREFORE, Plaintiff would hereby request this Honorable Court to:

1. Render judgment against the State of Tennessee and Polk County for damages for the plaintiff Lane's humiliation and embarrassment during the course of these proceedings in an amount not to exceed $100,000 as well as his attorney fees, cost and expenses pursuant to the provisions of 42 U.S.C. 12133 and 29 U.S.C. 794a. for defending him in the grievance procedure, his vindication of his rights in the state court, and for bringing this action.

2. Render judgment against the State of Tennessee, Trousdale, Jackson, Clay and Pickett Counties for damages for the plaintiff Jones' humiliation and embarrassment associated with her attempting to gain access to the defendants' courthouses and for her damages associated with her lost earnings associated with her inability to work in said courthouses in an amount not to exceed $250,000 as well as her attorney fees, cost and expenses pursuant to the provisions of 42 U.S.C. 12133 and 29 U.S.C. 794a. for bringing this action.

3. That this court certify this as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure and that proper notice be given to all individuals in the class in order that they may make the proper elections.

4. That this court take such actions necessary and proper through declaratory judgment and injunctive relief to compel the State of Tennessee and other defendants to comply with the provisions of the Americans with Disability Act, and further award such damages to the class representatives as are fair and proper. Further that this court award damages to each member of the class for said humiliation and embarrassment associated with the defendants failure to comply with the ADA. Further that the court compel the State of Tennessee to do a survey of all counties of the State of Tennessee to determine if they in fact fully comply with the provisions of the State of Tennessee, and if they fail to do so join them as party defendants and compel them to comply with the ADA.

5. That this court grant general relief to the plaintiff and all other persons that are members of the class.

Respectfully Submitted,
George Lane, and
Beverly Jones, Plaintiffs

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